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No. 97-23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STEPHEN L. GOEWEY, BY HIS NEXT FRIEND, JULIE A. GOEWEY, AND KEVIN D. GOEWEY

Petitioners,

v.

FLUOR DANIEL, INC., FD SERVICES, INC., AND UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The petition for certiorari demonstrated that this case involves, the same question presented in *General Electric Co.* v. *Joiner*, No. 96-188 (*cert. granted* Mar. 17, 1997): What is the standard for appellate review for trial court decisions excluding expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)? This Court has already held in abeyance the petition in *Cavallo v. Star Enterprise*, No. 96-1493, apparently pending the disposition of *Joiner*. Such a course is warranted here.

Review is also appropriate because the Fourth Circuit in this case erred, under *Daubert*, by deciding upon the correctness of the plaintiffs' experts' conclusions rather than upon whether the experts' testimony was derived from a scientifically valid methodology; by holding that plaintiffs could not combine the testimonies of more than one expert to satisfy the elements of their claim of causation; and by denying plaintiffs the right to plead inconsistent theories of liability.

The brief in opposition attempts to submerge these legal questions in misstatements of the record. Respondents go so far as to make the astonishing and utterly unsupported assertion that "[p]etitioners did not present any studies or data establishing a causal link between the roof coating and Stephen's condition." Opp. Cert. 3. As analyzed in detail in the Petition for Certiorari, there was both circumstantial and expert evidence supporting such a linkage.

However, this Court need not engage in fact-intensive review of the record in this case in order to appreciate the importance of the legal questions presented.

1. The brief in opposition claims that the first question — relating to the standard of review — is not properly presented because it was supposedly not raised in the Court of Appeals.

Although this Court ordinarily will not review a question not pressed *or* passed on by the courts below, *e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Husty v. United States*, 282 U.S. 694, 702 (1931); *Duignan v. United States*, 274 U.S. 195, 200 (1927), here the Fourth Circuit indisputably decided the standard of review issue. App. 8a (citing *United States v. Powers*, 59 F.3d 1460, 1471 (4th Cir. 1995)). Thus, the question would be properly before this Court regardless of how the parties argued it. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995); *United States v. Williams*, 504 U.S. 36, 41 (1992). The cases cited by respondents (Opp. Cert. 10-11) are inapposite: *Heller v. Doe*, 509 U.S. 312, 319 (1993) (issue not pressed or passed on the lower courts); *Springfield v. Kibbe*, 480 U.S. 257 (1987) (issue not raised in the lower courts in any form).

In this case, the *Joiner* issue was raised in the Fourth Circuit in the only way it could have been: by way of a supplemental letter pursuant to Fed. R. App. Proc. 28(j) dated September 9, 1996. The letter explained that, although the plaintiffs' opening brief on appeal was filed on April 8, 1996, with reply brief filed on May 22, 1996, and although *Joiner* was decided on March 27, 1996, *Joiner* "was not published until a later time." Plaintiffs-Appellants Letter to the Fourth Circuit of September 9, 1996, at 1.[1]

In *United States v. Powers*, 59 F.3d 1460, 1471 (4th Cir. 1995) (cited at App. 8a), the Fourth Circuit had previously recognized that the abuse of discretion standard governed trial

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[1] Respondents' suggestion that the stringent appellate review standard "comes from *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1253 (1995)" (Opp. Cert. 10), is misplaced. The "hard look" described in *Paoli* was based on the abuse of discretion test: a "hard look" at the trial court's exercise of its discretion. *See Paoli*, 35 F.3d at 750 ("the likelihood of finding an abuse of discretion is affected by the importance of the district court's decision to the outcome of the case and the effect it will have on substantive rights").

court decisions excluding expert testimony. Powers held that "[w]e review the district court's refusal to admit scientific evidence for abuse of discretion." 59 F.3d at 1471. "Under the *Daubert* analysis, a trial judge has a great deal of discretion in deciding whether to admit or exclude expert testimony." *Id.* (internal quotation omitted).

To insist that plaintiffs were required to anticipate and argue the standard ultimately set out in *Joiner* — in the face of contrary Fourth Circuit precedent as represented by *Powers* — would run afoul of the principle recognized in *Johnson v. United States,* 117 S. Ct. 1544 (1997): "such a rule would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." *Id.* at 1549.

2. Respondents also contend that plaintiffs' experts employed flawed methodologies and that their testimony was in any event inadmissible under *Daubert.* That is false. In fact, most of respondents' points are attempts to pick at the experts' conclusions — that is, they are ill-disguised jury arguments — many of which were anticipated in the Petition for Certiorari.

• Respondents try to attack Dr. Lieberman's testimony by claiming that plaintiffs have "abandoned" the chlordane theory. Opp. Cert. 8, 14. That is false. *See* Pet. for Cert. 19 n.9. Moreover, Dr. Lieberman focused not simply on chlordane but also testified that Stephen's condition was "most probably" due to exposure to a solvent like toluene as well. App. 14a. In fact, Dr. Lieberman noted the existence of "biological markers of exposure with hippuric acid from the toluene and the sample taken at the Medical University for the oxychlordane [pesticide]." *Id.*

• Respondents contend that there was no evidence that Stephen had been exposed to TOCP. Opp. Cert. 7. Not true. Even the Fourth Circuit acknowledged that "Dr. Robert Simon

testified to the presence of TOCP." App. 7a. *See also* Pet. for Cert. 8, 9 (recounting the evidence of TOCP exposure).

• Respondents attack the methodology of Dr. Abou-Donia, whose monoclonal antibody assay demonstrated that Stephen had been exposed to TOCP. Respondents' claim that the test had previously been used only on chickens is immaterial. What is tested is the phospholoration of neurofilaments — a physiological response that does not vary from chickens to humans. JA 396, 1629. Dr. Abou-Donia indicated that his methodology was sound and quite reliable. JA 267-68, 270. Respondents' claim that the methodology has not been published (Opp. Cert. 12) is false; Dr. Abou-Donia has published an explanation of the test in a publication co-authored by members of the Neurotoxicology Division of the U.S. Environmental Protection Agency. JA 427. The rate of error in monoclonal antibody assays is known to be extremely low, especially for false positives, according to FD's own expert, since it is but a measurement. JA 1006.

• Dr. Garretson's credentials as an expert are impeccable: he is associate professor of pediatrics at Emory University School of Medicine, board certified in medical toxicology, and co-director of the Nation's fifth largest poison control center. JA 236. Respondents' criticism of Dr. Garretson's testimony centers on his admission that he had no personal knowledge that Stephen was exposed to TOCP (Opp. Cert. 3); however, this proof was provided by other witnesses. Respondents also contend that there was no explanation for the supposed delayed onset of symptoms. Opp. Cert. 3-4. But in fact there was no such delayed onset of signs of exposure. *See* Pet. for Cert. 4-5. In addition, the evidence showed that such a delay, if it had occurred, would not have been surprising. *See* Pet. for Cert. 10.

• Respondents' interpretation of Dr. Bernad's testimony (Opp. Cert. 5) is inaccurate. Dr. Bernad opined that Stephen's

condition was caused by a toxic insult. JA 511. He testified that, aside from an episode of oxygen deprivation, a toxic insult would be the only explanation for his injury. JA 511-18.

• Respondents' criticism of Dr. Hartman (Opp. Cert. 6, 12) is limited to his pyridine theory. It does not extend to other aspects of his testimony — in particular, his testimony that Stephen suffered a "neurotoxic event" caused by the soup of chemicals to which he was exposed. JA 1119-22.

3. Respondents have very little of substance to say with respect to the second question presented. This is not a case where an expert has offered "a personal opinion unsupported by evidence." Opp. Cert. 14. Here, the expert testimony is based on evidence of Stephen's exposure to a neurotoxin; it is consistent with the symptoms he exhibited; it is confirmed by extensive testing at Charleston Navy Hospital, Bethesda Naval Hospital, Duke University Medical Center, and the Medical University of South Carolina, which ruled out any other cause for Stephen's problems; and it was also supported by the fact that Stephen did not progressively deteriorate, but ultimately stabilized and began a slight improvement, which was an indication that his problems were not the result of neurological disease or a genetic disorder.

Further, both respondents and the Fourth Circuit ignore the principle that expert testimony need not be supported by *other* evidence in order to defeat a summary judgment motion. "An expert's opinion or interpretation of evidence is itself evidence." *Rodriguez v. Olin Corp.*, 780 F.2d 491, 496 (5th Cir. 1986). Thus, the Fourth Circuit erred in brushing aside Dr. Lieberman's testimony on the ground that it was unsupported by any additional testimony in the record. App. 9a-10a. Such corroboration was unnecessary.

Moreover, respondents completely ignore the Fourth Circuit's holding that the district court properly excluded other

expert testimony proffered by plaintiffs because "[n]o single one of Goewey's three witnesses could testify both that TOCP was present in the roof sealant, and that, if present, TOCP could cause Goewey's injury." App. 7a. As we showed in the Petition for Certiorari (at 20-22), this holding is flatly inconsistent with decisions of this Court and of other courts of appeals. Respondents do not even try to defend it.

4. Respondents claim that plaintiffs — even at this pretrial stage — are not entitled to plead and argue alternative or inconsistent theories of liability. If they do so, according to respondents, "[w]hen the testimony is considered as a whole, the evidence amounts to speculation." Opp. Cert. 16. As noted in the petition (at 22-24), respondents' position is foreclosed by Fed. R. Civ. P. 8(e)(2) and a host of decisions in other circuits. Indeed, the degree of inconsistency was greater — at the *trial* stage — in *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 109 (1959), *see also Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944); *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 269 (3d Cir. 1991). Yet those decisions expressly rejected the defendants' argument that such "inconsistency" prevents a jury from returning a verdict for the plaintiff.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted or, at minimum, held pending the decision in *General Electric Co. v. Joiner*, No. 96-188.

Respectfully submitted,

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